RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY
Rok LXXXV – zeszyt 4 – 2023
https://doi.org/10.14746/rpeis.2023.85.4.02

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THE DISCRETION OF THE EU MEMBER STATES IN SHAPING THE NON-CONVICTION BASED CONFISCATION REGIME IN THE LIGHT OF CJEU AND ECHR CASE LAW[1]

ZAKRES SWOBODY PAŃSTW CZŁONKOWSKICH UE W KSZTAŁTOWANIU REŻIMU KONFISKATY NIEBAZUJĄCEJ NA WYROKU SKAZUJĄCYM W ŚWIETLE ORZECZNICTWA TSUE I ETPC

The research presented in the article aims to assess the scope of the normative freedom of EU Member States when implementing non-conviction based confiscation. This study was based on the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR). The study shows that despite the broad discretion of the Member States resulting from the position of the CJEU, domestic regulation of this type of confiscation falls outside the scope of EU law; the extensive jurisprudence of the ECHR sets quite precise boundaries concerning the concept of confiscation without prior conviction. Thus, it limits the discretion of Member States in this regard, providing both safeguards for individuals and guidelines for national legislators that intend to develop non-conviction based confiscation regimes in their domestic legal system.

Keywords: non-conviction based confiscation; asset recovery; cooperation in criminal matters; EU criminal law; organized crime; forfeiture; human rights

Celem badań przedstawionych w niniejszym artykule jest ocena normatywnego zakresu swobody, jakim dysponują państwa członkowskie Unii Europejskiej we wdrażaniu konfiskaty bez uprzedniego wyroku skazującego. Badanie to przeprowadzono na podstawie orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej (TSUE) i Europejskiego Trybunału Praw Człowieka (ETPC). Wyniki badania wskazują, że mimo szerokiej dyskrecjonalności państw członkowskich wynikającej ze stanowiska TSUE, według którego krajowe regulacje tego rodzaju konfiskaty nie wchodzą w zakres prawa UE, obszerne orzecznictwo ETPC wyznacza dosyć precyzyjne granice w zakresie koncepcji konfiskaty bez uprzedniego wyroku skazującego. Tym samym ogranicza ono margines swobody państwa członkowskiego w tym zakresie, zapewniając zarówno gwarancje jednostkom, jak i wytyczne dla krajowego ustawodawcy, który zamierza wprowadzić system konfiskaty bez uprzedniego wyroku skazującego w krajowym systemie prawnym.

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[1] This article was written within a research project no 2022/45/B/HS5/03080, founded by the National Science Centre, Poland.

RPEiS 85(4), 2023: 27–47. © WPiA UAM, 2023. ISSN (Online) 2543-9170 ISSN (Print) 0035-9629

Słowa kluczowe: konfiskata bez uprzedniego wyroku skazującego; współpraca w sprawach karnych; prawo karne UE; przestępczość zorganizowana; przepadek; prawa człowieka

I. INTRODUCTION

This paper analyses the extent to which Member States of the EU can implement non-conviction based confiscation (NCBC) in the light of Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECHR) case law. Due to their position in the European system of human rights, these two courts are the most prominent binding indicators of the limits of legislative freedom for Member States of the EU. In the first section, a conceptual analysis of NCBC is undertaken to define its meaning for the purposes of the paper and to indicate its distinctive features, distinguishing it from typical criminal confiscation. In the subsequent sections, the most relevant case law of the Strasbourg and Luxembourg courts is examined in order to assess their position towards NCBC and the requirements for national legislation regarding such instruments. The paper's final section presents an overview of the legal framework in which NCBC is plausible from the perspective of fundamental rights and is binding for the domestic legislators of the Member States of the EU.

II. NCBC AND OTHER TYPES OF CONFISCATION

Confiscation is generally seen as a legal tool that allows the State to acquire assets connected to the perpetration of a crime; nevertheless, it is considered a polymorphous legal concept, depending on its object and function.[2] Given the fact that there are many typologies of different regimes of confiscation,[3] it is instructive to follow the one enshrined in the leading legal act of the EU which harmonized confiscation: Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[4] This act covers traditional criminal confiscation (with a subtype of confiscation as a result of ineffective criminal proceedings); extended confiscation, which allows for confiscation of assets that are not directly linked to the crime for which the

[2] Milone (2017): 151.

[3] For extensive analyses and typologies, see Rui (2015): 1–10; France (2022); Panzavolta (2017): 25–52; Fernandez-Bertier (2016): 323, 328; Simonato (2015): 213; Eurojust (2013), Report on non-conviction-based confiscation. https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/EUROJUST_20130402_NCBC_Report.pdf: 9–15; European Commission (2019), Commission Staff Working Document. Analysis of non-conviction based confiscation measures in the European Union (Brussels, 12.4.2019. SWD (2019) 1050 final): 3, https://data.consilium.europa.eu/doc/document/ST-8627-2019-INIT/en/pdf

[4] OJ L 127, 29.4.2014, p. 39, as amended. For other acts see (n. 21).

offender is being prosecuted but is 'extended' beyond it to other assets owned by the defendant; and third-party confiscation, which allows for confiscation of assets transferred to third parties or directly acquired by third parties from a suspected or accused person.

Nevertheless, Directive 2014/42/EU provides for the possibility of other confiscation regimes in domestic legal systems – it explicitly states that it is without prejudice to the procedures that the Member States may use to confiscate the property in question.[5] Similarly, Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders[6] states that it does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters.[7] This is the case because there is another type of confiscation – non-conviction based confiscation (hereinafter NCBC). It is employed in a couple of Member States[8] (e.g. Ireland, Bulgaria, Italy, Lithuania) but importantly, the European Commission has recently proposed a new directive on asset recovery and confiscation which includes such an instrument[9] – the confiscation of property linked with criminal activities which is eligible for forfeiture without formal conviction in criminal proceedings (see Article 16 of the proposal[10]). Adoption of this proposal would make NCBC a common instrument in the EU.

Even though NCBC has been incorporated in many different variations in diverse legal systems, its core feature is clear: it allows the confiscation of property that is presumed to have derived from illicit activities, without the need for a prior criminal conviction (although there may be some link between

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[5] Article 1(2) of the Directive 2014/42/EU.

[6] OJ L 303, 28.11.2018, p. 1.

[7] Article 1(4) of the Regulation 2018/1805.

[8] For a recent overview of national legislation of non-conviction based confiscation, see the Council of Europe (2020), The Use of Non-Conviction Based Seizure and Confiscation, https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3, and Eurojust (2013).

[9] The Commission indicated Article 82, 83 and 87 TFEU as a legal basis, since even though NCBC is non-criminal in nature, it is treated as a subsidiary to a criminal means instrument, intended to enforce the EU policy to fight crime. Thus, as the directive itself concerns predominantly criminal measures, according to the 'gravity test' established by CJEU case law, it can also regulate non-criminal instruments which support the main purpose of the directive, see case C-71/02, *Karner*, EU:C:2004:181, § 47, and the case law discussed in Öberg (2019): 111 f. Rui and Seiber also discuss the *argumentum a maiore ad minus*: if the EU has the competence to harmonize serious and stigmatizing criminal sanctions, it should also have the competence to demand similar but less strict consequences for crimes, see Rui, Seiber (2015): 286.

[10] COM(2022)245 final. This proposal is considered to be an attempt to answer the problems posed by the current legal framework as pointed out by both scholars and EU agencies and bodies. An unharmonized approach towards NCBC imposes challenges in the context of judicial cooperation and mutual recognition between Member States since most of the EU countries only recognize foreign orders issued within proceedings in criminal matters. See Alagna (2015): 447–461; Maugeri (2018): 392–455; King (2022): 105–120; Wycichowski-Kuchta (2022): 169–174; Eurojust (2019), Report on Eurojust's Casework in Asset Recovery (February 2019), https://www.eurojust.europa.eu/sites/default/files/publications/reports/2019-02-12_ej-casework-asset-recovery_full-report_en.pdf, and Eurojust (2013).

the confiscation and criminal proceedings, e.g., a requirement to press charges against the person, or the status of politically exposed person).[11] This concept can be traced to the common law jurisdictions where, especially in the US, it took the form of anti-narcotics and anti-organized crime laws and its success led to the inclusion of this instrument in other jurisdictions, including some civil law legal systems[12] (such as in Bulgaria and Italy). The purpose of an NCBC proceeding is not to investigate a particular offence – the proceeding aims to determine the possibility of the illicit origin of property, not a person's guilt.[13] This separate proceeding concerning confiscation is not criminal in nature – it is of a civil or administrative character. Another characteristic is that in such proceedings, the burden of proof is usually transferred to the property owner[14] or there are rebuttable presumptions which entail that in the absence of evidence to the contrary, the property is subject to confiscation.[15] Fundamentally, the proceedings concern 'dirty' assets and the court assesses if it is more likely that the origin of the assets in question is illegal.[16] While deciding on this matter, the court usually relies on the 'balance of probabilities' standard (rather than 'beyond reasonable doubt', as generally applied in a criminal trial).[17] Typical circumstances which justify the initiation of proceedings against particular property are an imbalance between the owner's assets and lawful source of income, the history of transfer for given property, or substantiated information that a particular person has ties to organized crime.

To sum up, NCBC is issued in *in rem*, non-criminal proceedings that target assets which originated from an illicit source. No prior criminal conviction is needed to initiate such a proceeding, and the procedural safeguards present in criminal trials are absent – usually reversing the burden of proof or establishing rebuttable presumptions and lowering the threshold of proof (to a different degree).

III. THE LIMITED SCOPE OF EUROPEAN UNION LAW: THE CJEU ON NON-CRIMINAL CONFISCATION

The Commission's initiative reignited the debate about the freedom of Member States to shape NCBC regimes. On the one hand, from policymakers' standpoint there is an apparent gain from including such an instrument,

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[11] For a review of the preconditions that are essential to trigger a non-conviction-based confiscation proceeding in legal systems in Europe, see Bikelis (2020): 32.

[12] Kolarov (2020): 562–565; (2021): 484.

[13] Thus, commentators actively seek theoretical bases other than guilt that would increase the legitimacy of those kinds of instruments, such as unjust enrichment, public order measures or *condictio furtiva*. For a discussion, see Vogel (2015): 226–242; Panzavolta (2017): 44–51; Kolarov (2020): 569–570.

[14] Panzavolta (2017): 43–44; Boucht (2017a): 129.

[15] Kennedy (2006): 139–140.

[16] Levi, Reuter (2006): 289–376.

[17] Rui (2015): 5.

since it does not involve the problematic threshold of a criminal conviction, so it would facilitate tracking and forfeiture of illicit assets[18] – this is essential to NCBC since it allows legislators to effectively fight the effects of not only organized crime offences, money laundering and corruption, but also breaches of international sanctions and EU restrictive measures, which in the current geopolitical context has become an urgent issue.[19] On the other, however, from the perspective of fundamental rights the idea of NCBC is often contested, as it does not have the same guarantees and rights as typical criminal confiscation, jeopardizes the rights of the individual whose property is targeted by the non-criminal confiscation,[20] and thus remains a controversial instrument.

Given the above, it is necessary to analyse how NCBC is treated from the perspective of EU law – since Directive 2014/42/EU does not directly mention NCBC, two questions are raised: if it is possible for Member States to include such an instrument in domestic legal systems, and what limits stemming from EU law may restrict Member States' discretion.

The current EU legal framework concerning confiscation is fragmented.[21] Nevertheless, the two main legal acts that govern confiscation from a substantive and procedural perspective are, respectively, Directive 2014/42/EU and Regulation 2018/1805. Their scope is similarly shaped since, according to Article 1(1) of both acts, they are applied to the 'confiscation of property in criminal matters'. The lack of a clear definition of 'criminal matters' was criticized by scholars due to uncertainty about whether NCBC falls within the scope of those acts.[22] Even though other provisions of those acts regulating their application suggest that non-criminal confiscation falls outside of their scope of application, due to the vagueness of the term 'criminal matters' and uncertainty around how to determine whether a national proceeding is 'criminal', 'civil' or 'administrative', it has remained unclear.

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[18] European Commission (2019); European Commission (2020), Asset recovery and confiscation: Ensuring that crime does not pay (Brussels, 2.6.2020 COM(2020) 217 final), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0217. See also Vettori (2006): 78; Rui, Sieber (2015): 261.

[19] See recital 6 of the proposal on a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 final.

[20] See Hendry, King (2015): 398–411; Rakitovan (2016): 78–97 and in the context of Italian anti-mafia regulations Panzavolta, Flor (2015): 111.

[21] Apart from Directive 2014/42/EU and Regulation 2018/1805 there are other legal acts on confiscation that are still in force to some extent, e.g. Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA) (OJ L 333, 9.12.1998, p.1, as amended); Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, p. 49, as amended) or Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (OJ L 332, 18.12.2007, p. 103).

[22] Meyer (2020): 144; King (2022): 105–120.

The CJEU tackled this issue in the *Agro in 2001* judgment,[23] in which the Bulgarian regime of civil confiscation was assessed. The CJEU was faced with a preliminary question from the Bulgarian court as to whether the confiscation of property from illegal sources, regardless of the finding of an offence in a final judgment or conviction, is compatible with relevant EU law. Bulgarian confiscation proceedings take place before a civil court and are independent of criminal proceedings brought against the person under investigation and/or the persons associated with or controlled by them. The mere existence of criminal charges suffices for civil confiscation proceedings to be commenced.[24] Basically, the CJEU had to decide whether Bulgarian civil confiscation actions should be treated as being issued 'within criminal matters'. Firstly, it stated that no provision of EU legislation precludes non-criminal confiscation regimes. Secondly, the CJEU noted that, under Bulgarian law, civil confiscation proceedings coexist with a regime for confiscation under criminal law. The former is focused on illegally acquired property, independent of any criminal proceedings against the perpetrator of the crime and, most importantly, irrespective of the outcome of these proceedings.[25] What is quite controversial is that the CJEU did not apply the *Engel* criteria, which are usually used to determine the criminal nature of the particular legal instrument – the CJEU relied only on the classification of the assessed instrument in domestic law. For this reason, the CJEU concluded that Framework Decision 2005/212/JHA, which was applicable in this case, does not preclude legislation by a Member State which provides that the confiscation of illegally obtained assets is ordered by a court regardless of the criminal conviction.

The CJEU came to the very same conclusion in the case of *ZV and AX*,[26] which also concerned a confiscation ordered in Bulgarian civil proceedings, but on the grounds of Directive 2014/42/EU. In addition, the CJEU directly stated that in consequence of the narrow application of the EU law, the Charter of Fundamental Rights of the European Union does not apply to non-criminal confiscation regimes[27] – something that was implied by *Agro in 2001*, but never explicitly stated. Similarly, in the case *Otdeli*,[28] the CJEU concluded that, while an administrative forfeiture based on customs law from the procedural point of view falls under regulation no 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code,[29] the forfeiture itself does not relate to a criminal offence and is outside the scope EU's legal framework. Therefore, it is apparent that EU law does not cover domestic legislation providing for confiscation proceedings that do not depend on the finding of a criminal offence or a conviction.[30] The consequences

[23] Case C-234/18 *Agro in 2001*, EU:C:2020:221.
[24] Ibid.: § 39.
[25] Ibid.: § 60.
[26] Case C-319/19 *ZV and AX,* EU:C:2021:883.
[27] Ibid.: § 43–46.
[28] Case C-752/21, *Otdel 'Mitnichesko razsledvane i razuznavane',* ECLI:EU:C:2023:179.
[29] OJ L 269 10.10.2013, p. 1 with further amendments.
[30] *Agro in 2001*: § 61–62; *ZV and AX*: § 41.

of this conclusion are, firstly, that the current EU legal framework does not oppose domestic NCBC regimes, and secondly, that national legislators are granted discretion while shaping instruments of NCBC from the perspective of the EU law because individual guarantees, especially the ones resulting from the Charter of Fundamental Rights of the European Union, do not apply to them.[31] This is the case due to fact that the provisions of Article 51(1) of the Charter are addressed to the Member States only when they are implementing EU law – which presupposes a degree of connection between an act of EU law and the national measure at issue which goes beyond the matters referred to or the indirect effects of one of the matters on the other.[32]

It is worth noting, however, that although the CJEU's case law closed the path for national NCBC legislation to be covered by EU law, it does not mean that obligations arising from the EU law could not potentially influence domestic legislation at all. Interesting interpretations may emerge from the *Plovdiv* case[33] and the subsequent case law[34] in the context of the third party's owner protection. The CJEU stated that in cases of criminal confiscation, where the instrumentalities of the crime are owned by a *bona fide* third-party, confiscation of this property is not possible. Additionally, in every case of property belonging to a person other than the person who committed the criminal offence, the third party must be afforded an effective remedy before confiscation is executed.[35] In *DR and TS* the CJEU reiterated this position and claimed that in the case of confiscation of property which belongs to a person other than the perpetrator of the criminal offence, there would be a breach of Directive 2014/42/EU if that person did not have the right to appear as a party in the confiscation proceedings.[36] Similarly, this approach was developed in *RR and JG*, in which the CJEU stated that applying EU law to criminal confiscation precludes any national regulation which, in cases of property seized as a possible instrument of crime or the proceeds of crime, at the judicial stage of the criminal proceedings, does not provide the right for a *bona fide* third-party owner to apply to the competent court for the return of their property.[37] What may be important in this context from the perspective of NCBC confiscation is that the CJEU came to that conclusion not only in cases of extended criminal confiscation, which is without a doubt within the scope of EU law, but also in the case of administrative confiscation without prior conviction, which the CJEU deemed to

[31] For the in-depth analysis of *Agro in 2001* judgment and its consequences, see Wycichowski-Kuchta (2022): 159–175.

[32] *ZV and AX*: § 44.

[33] Case C-393/19, *Plovdiv,* ECLI:EU:C:2021:8.

[34] Joined cases C-845/19 and C-863/19, *Criminal proceedings against DR and TS*, ECLI:EU:C:2021:864: § 76–85, and case C-505/20, *Proceedings brought by RR and JG*, ECLI:EU:C:2022:376: § 34–38.

[35] *Plovdiv*: § 55–57 and § 61–68.

[36] *DR and TS*: § 81–85.

[37] *RR and JG*: § 35–38.

fall outside of the scope of EU law.[38] In this case, as mentioned before, the link between EU law and the domestic regulation was found in the Union Customs Code. In *Otdel,* the CJEU found a similar requirement as in cases of criminal confiscation – national legislation has to provide for a right of appeal against an administrative penalty notice by a person whose property has been seized.[39]

This approach from the CJEU in terms of protection of the third-party property owner may indicate that, even in cases of non-criminal confiscation, as above, a party affected by decisions concerning their property has the right to appeal against them – nevertheless, for this judicial pattern to be applicable to national regulations, it has to be within the scope of EU law. It is, however, worth noting that in the *Plovdiv* case, the CJEU reached directly for ECHR case law[40] to seek justification for the contested property owner's procedural rights, and stated that national legislation and practice which do not provide for a procedure by which the owner can defend his or her property rights, would fail to meet the standards of the Convention, since they have to provide for such a procedure in which the person who was not tried for the criminal offence leading to the confiscation is able to seek recovery of their property from a third party. It is also important to remember that property protection has been considered a general principle of the EU since the late 1970s.[41] General principles of EU law usually do not express subjective rights (unlike the provisions of the Charter) but express similar normative requirements in the form of an objective legal principle[42] and are applicable to a broader scope than the fundamental rights enshrined in the Charter.[43] Given that, it is worth asking the question of whether in the case of NCBC, situated outside the core of EU law, the CJEU has the possibility to look for some links with EU legislation that would ensure procedural safeguards for property owners. In its case law, the CJEU[44] confirmed that domestic regulations regarding VAT fraud, despite not being the direct implementation of EU law, are within its scope (Article 325(1) and (2) TFEU). Thus, given the preventive and compensatory character of NCBC, it may be seen as a measure that protects the EU's budget when it targets the assets that originated from VAT tax frauds, but unfortunately, the CJEU has not yet had an opportunity to elaborate on this matter and deemed that EU law generally does not apply to domestic NCBC regimes.

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[38] *Otdel 'Mitnichesko razsledvane i razuznavane'*: § 30–37, § 44–46, § 48.

[39] Ibid.: § 37.

[40] *Plovdiv*: § 67.

[41] Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz,* EU:C:1979:290: § 15.

[42] Krajewski (2018): 404.

[43] 'Even if Article 51(1) of the Charter were subject to a strict interpretation, the scope of application of general principles of EU law should not be adversely affected. General principles would take over where the scope of application of the Charter ends,' Lenaerts, Gutiérrez-Fon (2010): 1659.

[44] Case C-617/10, *Fransson,* EU:C:2013:105: § 26; Case C-105/14, *Taricco,* EU:C:2015:555: § 38; Case C-42/17, *M.A.S., M.B.*, EU:C:2017:936: § 31.

IV. TOWARDS A COMPREHENSIVE FRAMEWORK? THE ECHR'S CASE LAW ON NCBC

Given the currently limited scope of EU law in the context of national NCBC regulations, the main point of reference to examine the discretion of domestic legislation concerning this instrument becomes the case law of the ECHR. The ECHR provided a comprehensive legal framework for assessing national NCBC regimes in the early 1990s.[45] Scrutiny of this case law brings to light two key limitations to the usual wide discretion allowed to the State under the Convention regarding crime prevention policies, including confiscation of property presumed to be of unlawful origin – a substantive one, which results from Article 1 of Protocol 1 to the Convention, and a procedural one, grounded in Article 6 of the Convention.

1. Article 1 of Protocol 1 to the Convention: the right to property

The permanent deprivation of property is considered interference with the right to peaceful enjoyment of property protected by Article 1 of Protocol 1 to the Convention.[46] Generally, Article 1 of Protocol No. 1 to the Convention guarantees the right to property from the substantive perspective by ensuring that any interference with this right is in line with three rules: the principle of peaceful enjoyment of property in general, the principle that deprivation of possessions may take place only in the public interest and subject to the conditions provided for by law and by the general principles of international law, and finally the rule that the Contracting States are entitled to control the use of property in accordance with the general interest.[47] The ECHR usually qualifies confiscation measures as 'control of the use of property', which means they fall under a less restrictive examination standard, which requires merely a general interest to justify.[48] Still, there are individual cases in which the ECHR regards such measures as deprivation of property – the difference seems to be that in those minority cases, the ECHR dealt with property which had been acquired lawfully but was involved in illicit activity, where the owner could not seek restoration of his property, and thus this was deemed a permanent measure which entailed a conclusive transfer of ownership.[49]

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[45] The first judgment concerning non-conviction confiscation was issued in 1991, see *M v. Italy*, App. no. 12386/86 (ECHR, 13 April 1991).

[46] Boucht (2017b): 127.

[47] See especially *Sporrong and Lönnroth v. Sweden*, App. no. 7151/75 and 7152/75 (ECHR, 23 September 1982): § 61.

[48] *AGOSI v. the United Kingdom,* App. no 9118/80 (ECHR, 24 October 1986); *M v. Italy*; *Arcuri and Others v. Italy*, App. no. 52024/99 (ECHR, 5 July 2001); *Riela and Others v. Italy,* App. no. 52439/99, (ECHR, 4 September 2001); *Raimondo v. Italy*, App. no. 12954/87 (ECHR, 22 February 1991); *Silickiene v. Lithuania,* App. no. 20496/02 (ECHR, 10 April 2012); *Saccocda v. Austria*, App. no. 69917/01 (ECHR, 18 December 2008); *Gogitidze and Others v. Georgia*, App. no. 36862/05 (ECHR, 12 May 2015).

[49] *Andonoski v. the Former Yugoslav Republic of Macedonia,* App. no. 16225/08 (ECHR, 17 September 2015): § 30; *Yaşar v. Romania*, App. no. 64863/13 (ECHR, 26 November 2019): § 49.

Nevertheless, the ECHR, in its most recent case law, stated explicitly that when confiscation is ordered independently of the existence of a criminal conviction and is aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes 'control of the use of property'.[50] As a consequence, the ECHR assesses NCBC measures under a three-step test: the lawfulness of the interference with property rights, a legitimate aim in the general interest that underlines the particular measure, and the fair balance between the burden of the individual and the objective of the measure.[51]

1.1. Lawfulness requirement

The first step of the assessment is the principle of lawfulness. It comprises two more detailed rules – a legal basis in domestic law for NCBC proceedings, and sufficient accessibility, precision and foreseeability of the given provisions and their application. The purpose of those requirements is to limit potential arbitrariness that may endanger an individual.[52] A sufficient legal basis is a strictly formal requirement, the Court expects the confiscation measures only to be grounded in statutory law, or at least in case law,[53] and thus it has to be supplemented by the more substantive and qualitative requirement of accessibility, precision and foreseeability. In this aspect, the Court examines if an individual can, based on the wording of the specific provisions and practice of the authorities in its application, foresee, to the degree that is reasonable in the circumstances, the consequences which a given action may entail and when it indicates the scope of discretion conferred on competent authorities.[54]

In the context of NCBC, this requirement is assessed by examining domestic law regarding the precise definitions of property that may be eligible for confiscation, explicit and limited preconditions of confiscation, temporal limits and defences against such measures, the scope of any presumptions and a clear way to overcome them, and whether the contested provisions were, in fact, in force at the time of the national proceeding.[55] This approach is most evident in the *Dimitrovi* case*,* in which the ECHR deemed the Bulgarian regulation on civil confiscation incompatible with the lawfulness requirement due to a lack of time limitations, which created a situation where the individual being investigated could be required to provide evidence of income received many years before the proceeding, without any reasonable limitation

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[50] *Gogitidze and Others v. Georgia*: § 94, and *Balsamo v. San Marino*, App. no. 20319/17 and 21414/17 (ECHR, 8 October 2019): § 81.

[51] Most exhaustively described in *Gogitidze and Others v. Georgia*: § 96–113, and *Dimitrovi v. Bulgaria,* App. no. 12655/09 (ECHR, 3 March 2015): § 44–56.

[52] See, among others, *Zlínsat, spol. s r.o., v. Bulgaria*, App. no. 57785/00 (ECHR, 15 June 2006): §98.

[53] *Imeri v. Croatia,* App. no. 77668/14 (ECHR, 24 June 2021): § 69.

[54] *Balsamo*: § 70.

[55] *Imeri v. Croatia*: § 69; *Yaremiychuk and others v. Ukraine,* App. no. 2720/13 et al. (ECHR, 9 December 2021): § 25–27; *Zaghini v. San Marino*, App. no 3405/21 (ECHR, 11 May 2023): § 59.

in time.[56] Moreover, according to the applicable Bulgarian law at that time, the prosecution authorities were free to 'open, suspend, close and open again proceedings at will at any time',[57] and there was no indication of what might constitute acceptable means of proving that income was 'lawful'.[58] Such a situation was unacceptable for the Court since, despite there being a formal legal basis for the confiscation, it was so deficient that it could not satisfy the basic tenet of all laws – compatibility with the rule of law.[59] An important note for national legislators is that not all retrospectivity in the context of NCBC is considered arbitrary. According to the ECHR, when introducing a new confiscation measure, it is not arbitrary to regulate the intertemporal scope of such provisions with retrospective regulation of continuing factual situations or legal relations. In such cases, the lawfulness requirement is not breached if the particular intertemporal scope of retrospectivity is clearly defined by law.[60] Further evaluation steps are undertaken only if the given regime fulfils the lawfulness requirement.[61]

1.2. General interest requirement

The second examination step is an assessment of the given confiscation regulation's aim – the ECHR verifies whether the provisions were introduced in the general interest. It is the 'easiest' requirement for national legislation to meet, since the ECHR accepts the choice of means by the domestic legislator unless it concludes that a particular instrument was selected without any reasonable foundation.[62] The justifications of NCBC from the perspective of general interest provided by the ECHR were numerous – being part of crime prevention policy,[63] fighting the dangerous economic power of an organization like the Mafia,[64] combating international drug trafficking,[65] complying with international obligations to monitor cash, and fighting transnational crime,[66] needs for transition periods and transformative justice,[67] general deterrence and guaranteeing that crime does not pay,[68] and the elimination of illicit funds from further circulation within the economy.[69] As shown above,

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[56] *Dimitrovi v. Bulgaria*: § 46.

[57] Ibid.: § 46.

[58] Ibid.: § 47.

[59] On the relation between the rule of law and the lawfulness requirement, see *Beyeler v. Italy*, App. no. 33202/96 (ECHR, 5 January 2000): § 109.

[60] *Gogitidze and Others v. Georgia* (n 47): § 99.

[61] *Frizen v. Russia*, App. no. 58254/00 (ECHR, 24 March 2005): § 33.

[62] *Béláné Nagy v. Hungary*, App. no. 53080/13 (ECHR, 13 December 2016): § 113.

[63] *M. v. Italy*.

[64] *Raimondo v. Italy*: § 27.

[65] *Air Canada v. the United Kingdom*, App. no. 18465/91 (ECHR, 5 May 1995): § 42; *Butler v. the United Kingdom*, App. no. 41661/98 (ECHR, 27 June 2002).

[66] *Ismayilov v. Russia*, App. no. no. 30352/03 (ECHR, 6 November 2008): § 33.

[67] *Suljagić v. Bosnia and Herzegovina*, App. no. 27912/02 (ECHR, 3 November 2009): § 42.

[68] *Denisova and Moiseyeva v. Russia*, App. no. 16903/03 (ECHR, 1 April 2010): § 58; *Rummi v. Estonia*, App. no. 63362/09 (ECHR, 15 January 2015): § 103.

[69] *Balsamo*: § 93; *Zaghini v. San Marino*: § 60.

different NCBC regimes were provided with a myriad of justifications – from policy-oriented ones to strictly economic reasons – and fulfilling the 'general interest' requirement in case of such regulations should be regarded as a well-established position of the ECHR.

1.3. Proportionality requirement

The last step of the threefold test is the proportionality requirement. It is the most comprehensive requirement range-wise, since the ECHR, while assessing the proportionality of a measure, considers not only the fair balance between individual rights and the general interest from the perspective of the intensity of interference, but also the procedural context. Even though Article 1 of Protocol 1 does not impose particular procedural requirements on the domestic legislator, the ECHR verifies whether the confiscation proceedings are generally shaped in a way that does not put an excessive burden on the party that is subject to interference and allows the aggrieved party to challenge imposed measures before relevant authorities effectively.[70] As aptly underlined by Meyer, despite the extensiveness of the proportionality test, the Court sets a relatively permissive standard while examining proportionality.[71] It challenges domestic confiscation measures only in cases of an excessive burden placed on property holders – and not in cases where the ECHR found that the state had at its disposal less intrusive means that would lead to identical or similar effects.

In the context of NCBC measures, the ECHR looks at several aspects of a particular measure. Firstly, it examines the fair balance between applied measures and the harm done by acquiring and using illicit property.[72] In *Butler*, the ECHR underlined that the amount subject to confiscation corresponded to what the applicant could have received through drug trafficking over the preceding years.[73] In this context a sufficient link is required between the illegal activity and the property – an example of applying this requirement can be seen in the case of *Rummi v. Estonia,* where the ECHR found a violation of Article 1 of Protocol No. 1, as the domestic courts had not established that the applicant's husband, of whom she was an heir, had committed any crime and did not carry out any assessment as to the sums the applicant's husband might have obtained through crime and invested in precious metals.[74] Further, the ECHR stated that not all kinds of illegal activities might be subject to NCBC. In *Todorov and others*, the ECHR stated that illicit property should be connected with important criminal activity that may reasonably

[70] *G.I.E.M. S.R.L. and Others v. Italy*, App. no. 1828/06 et al. (ECHR 28 June 2018): § 302, and *Denisova and Moiseyeva v. Russia*: § 50.

[71] Meyer (2020): 157.

[72] *Air Canda*: § 47.

[73] *Butler v. the United Kingdom*.

[74] *Rummi v. Estonia*: § 105–109.

be assumed to generate income, like mafia-related offences, drug-trafficking, corruption in the public service or money laundering.[75]

Secondly, the ECHR assesses the aggravated party's position within the frame of the confiscation procedure. While accepting the fact that the burden of proof of the property's licit origin may be shifted to the party subject to the confiscation, and also accepting certain presumptions which operate to the detriment of the accused (provided such presumptions, e.g. about the scope of property that may be subject to the confiscation, are confined within reasonable limits),[76] the State must justify its interest in particular assets by carrying out an individual assessment regarding them;[77] the authorities have to justify the grounds for the forfeiture and 'make out their case for the forfeiture'.[78] To prevent an individual from potentially arbitrary actions of the State, the authorities have to lend credence to their suspicion by providing some reasons justifying initiation of NCBC confiscation proceedings against particular property, for example an imbalance between the owner's assets and their legal income, the owner's connection to a criminal organization or the property's undocumented, opaque and suspicions origin, especially given its transfer history (usually not corresponding to the market value). In this context, the ECHR accepts forensic and circumstantial evidence.[79] Generally, the standard of proof is watered down from 'beyond reasonable doubt' to a balance of probabilities or a high probability of illicit origins. It basically means that for the court to order a NCBC, the state has to present reasoning which makes it probable that confiscation should be applied in the case of the given property, and the owner should be unable to prove the contrary[80] (by providing its licit pedigree or otherwise undermining the reasons put forward by the authorities, e.g. demonstrating they are inaccurate or untrue). Still, it is essential for a confiscation to not be automatically imposed without unconstrained evaluation by the court.[81]

Thirdly, the ECHR also developed the protection of the *bona fide* third-party owner of the property, since it repeatedly stated that confiscation measures might be applied not only to the alleged perpetrator of the potential offence that generated the contested assets but also to third-party owners (especially family members who hold ownership rights and other close relatives) who do not act in good faith and thus disguise their wrongful role in amassing the wealth in question,[82] which is a basic tenet of NCBCs targeted at assets, not the person (*in rem* proceedings).

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[75] *Todorov and others v. Bulgaria*, App. no. 50705/11 et al. (ECHR, 13 July 2021): § 200.

[76] *Butler v. the United Kingdom*.

[77] *Rummi v. Estonia*: § 108; *Silickiene v. Lithuania*: § 68; *Denisova and Moiseyeva v. Russia*: § 62.

[78] *Butler v. the United Kingdom*.

[79] Ibid.; *Todorov and others v. Bulgaria*: § 191.

[80] *Balsamo v. San Marino*: § 91; *Gogitidze and Others v. Georgia*: § 107.

[81] *Yaremiychuk and others v. Ukraine*: § 31.

[82] *Balsamo v. San Marino*: § 92.

2. Article 6 of the Convention: general classification under the requirement of a fair trial

Parallel to assessing the compatibility of NCBC with Article 1 of Protocol no. 1, the ECHR also refer to Article 6 § 1 of the Convention, which guarantees the right to a fair trial. This right has different content and safeguards depending on which limb of Article 6 § 1 of the Convention a particular confiscation measure interferes with – civil or criminal. As many authors have pointed out, the ECHR assesses the nature of confiscation measures on *a casu ad casum* basis.[83] Sometimes it is challenging to determine comprehensiveness in the Court's reasoning. Still, when it comes to different forms of NCBC issued in non-criminal proceedings, there are two lines of case law, which are: the 'penal' type, most comprehensively summarized in the *G.I.E.M. S.r.l. and Others v. Italy* judgment, and the 'civil' type, which was consolidated in the *Gogitidze and Others v. Georgia* case. In the first case, the ECHR found the Italian administrative land confiscation to be criminal[84] and thus 'reclassified' the measure in relation to its domestic categorization due to a number of circumstances: a dependence on criminal conviction, the involvement of criminal courts, the 'repressive' nature of the measure, the value of the illicit proceeds (in terms of the severity of the measure) or assessment of individual blameworthiness in the domestic proceedings[85] – these criteria were similarly applied in *Varvara v. Italy* and *Sud Fondi v. Italy,* in which the ECHR found non-criminal, administrative measures to be criminal, which was in breach of Article 7 of the Convention.[86] However, the ECHR came to this conclusion almost exclusively in the context of the abovementioned Italian administrative land confiscation. Since the *Gogitidze* judgment, the ECHR has applied the framework of the civil limb of Article 6 § 1 of the Convention to an overwhelming majority of the assessed non-criminal confiscation regimes since it stated that NCBC proceedings, especially those issued in civil *in rem* proceedings, do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty since they are considered to be of preventive and/or compensatory nature.[87]

Given the above, the assessment of compliance with fair trial standards by NCBC proceedings, which are by definition independent of prior criminal conviction and targeted against the assets, not the person, should be performed under the requirements of the civil limb of Article 6 § 1 of the Convention.

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[83] Meyer (2020): 146; Simonato (2017): 369; Ochnio (2017): 36.

[84] Similarly in *Varvara v. Italy,* App. no. 17475/09 (ECHR, 29 October 2013), and *Sud Fondi Srl v. Italy*, App. no. 75909/01 (ECHR, 20 January 2009).

[85] *G.I.E.M. S.R.L. and Others v. Italy*: § 215–232.

[86] *Varvara v. Italy* App. no. 17475/09 (ECHR, 29 October 2013): § 65–73; *Sud Fondi srl and Others v. Italy,* App. no. 75909/01 (ECHR, 20 January 2009): § 105–118.

[87] *Gogitidze and Others v. Georgia*: § 121. However, this approach has been well-established at the ECHR since the *M. v. Italy* judgement. In the context of the application of civil limb to the different non-criminal confiscation procedures see also *Raimondo v. Italy*: § 43; *Butler v. the United Kingdom*; *Veits v. Estonia*, App. no. 12951/11 (ECHR, 15 January 2015): § 58; *Silickienė*: § 45, 56.

This limb contains the bulk of the procedural safeguards and guarantees oriented towards the fairness of proceedings concerning property and assets that limit the discretion of national legislators while shaping NCBC regimes. It is important to note that the fairness of proceedings from the perspective of Article 6 § 1 of the Convention is considered in light of the proceedings as a whole, which means that multiple minor irregularities may result in overall unfairness, even if taken individually they are not enough to constitute a breach of the right to fair trial.[88]

2.1. Access to court and public hearing

The first issue tackled by the ECHR while assessing NCBC instruments is the right to access courts and to participate in a public hearing of the case. The primary issue resulting from the fair trial guarantees is that the party potentially affected by the confiscation should have a real possibility to be heard before the court and put forward any claim relating to his or her civil rights and obligations interfered with by the confiscation measure[89] – the domestic legal system must provide for the possibility of raising the illegality, unproportionality or arbitrariness of a confiscation measure.[90] From the ECHR's perspective, it does not matter whether a procedure is administrative or civil, or whether it is the same proceeding as that within which the confiscation order was issued – it is only important to be able to substantially question the applied measure in an independent court.[91] Nevertheless, under Article 6 § 1 of the Convention, a domestic legislator is obligated to provide a legislative framework that constitutes a coherent procedural system based on a clear and effective opportunity for the parties under the threat of confiscation to assert their claims against the State.[92] The ECHR found a breach of access to court in a Romanian case, where due to the interpretation of domestic provisions upheld by the Supreme Court, no Romanian court, in fact, had jurisdiction to rule on the applicant's claim against the seizure of valuable coins, and instead the applicant had to turn to the Prosecutor General to request the use of his discretionary power to return the property.[93] In the context of access to court, it is also important to note, given the potential interplay between a criminal trial and an NCBC proceeding, which may be conducted simultaneously and in parallel, that the ECHR stated that a third-party owner of challenged property should be formally granted the status of party to the criminal proceed-

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[88] *Barberà, Messegué and Jabardo v. Spain*, App. no. 10590/83 (ECHR, 6 December 1988): § 89; *Imbrioscia v. Switzerland*, App. no. 13972/88 (ECHR, 24 November 1993): § 38.

[89] *Prince Hans-Adam II of Liechtenstein v. Germany*, App. no. 42527/98 (ECHR, 12 July 2001): § 49.

[90] *AGOSI v. the United Kingdom:* § 55; *Arcuri and Others v. Italy*: § 55; *Riela and Others v. Italy*: § 55.

[91] *Rummi v. Estonia*: § 79.

[92] *Vasilyev and Kovtun v. Russia,* App. no. 13703/04 (ECHR, 13 December 2011) § 53, similarly in non-confiscation proceeding *Nicolae Virgiliu Tănase v. Romania*, App. no. 41720/13 (ECHR, 25 June 2019): § 192.

[93] *Vasilescu v. Romania,* App. no. 27053/95 (ECHR, 22 May 1998): § 39–41.

ings, however, there will not be a violation of Article 6 § 1 of the Convention in the event that such provisions are lacking, if there is a possibility within the domestic judicial system to use judicial remedies to contest any consequences resulting from the criminal proceeding.[94] Thus, in the context of separate NCBC proceedings, there is no requirement for the property owner to be a party to both criminal and civil proceedings – participation solely in the latter would be enough to fulfil the guarantees resulting from Article 6 § 1 of the Convention. This may be an important position for domestic legislators to note, since giving the third-party owner access to the criminal proceedings by making them an obligatory party at a trial would endanger the effectiveness of both the criminal and confiscation proceedings, especially by prolonging the former and giving the owners a chance to hide or transfer questionable assets.

Another element of a fair trial is the right to a public hearing – the ECHR has held that the right to a public hearing under Article 6 § 1 of the Convention implies a right to an oral hearing before at least one instance.[95] The absence of a hearing at the second or third instance may be justified by the unique features of the proceedings concerned, provided a hearing has been held at the first instance,[96] but since a confiscation order is issued by a court, not by an administrative body, there should be a second instance which would control the application of law made by the lower court. While the obligation to hold a hearing is not absolute, it must be respected more strictly in 'repressive' proceedings.[97] Nevertheless, even though an NCBC is considered a civil matter, it still should require strong justification to depart from the principle of publicity due to the public nature of one of the parties – the ECHR found violations of the right to public hearing in Italian cases where the statute regarding the confiscation proceedings did not provide an obligation for any public hearing.[98]

2.2. Qualities of proceedings: adversarial nature and equality of arms

The other crucial elements of the right to a fair trial are the adversarial nature of the proceeding and, closely connected to this, the principle of equality of arms. They are essential in NCBC proceedings since this kind of proceeding is targeted against assets which are deemed to have an illicit origin – thus, the owner of the challenged property must have the opportunity to be presented with any information adduced that is used to justify the prerequisites for an NCBC (like an imbalance between the person's assets and legal income, evidence connecting the person to a criminal organization, or the opaque origin of the property) and to refer to them to overcome the presumption. However,

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[94] *Silickienė v. Lithuania*: § 47–50; *Veits v. Estonia*: § 57–60.

[95] *Fischer v. Austria*, App. no. 16922/90 (ECHR, 26 April 1995): § 44.

[96] *Salomonsson v. Sweden*, App. no. 38978/97, (ECHR, 12 November 2002): § 36.

[97] *Xhoxhaj v. Albania*, App. no. 15227/19 (9 February 2021): § 240.

[98] See *Capitani et Campanella c. Italie*, App no. 24920/07 (ECHR 17 May 2011) and *Paleari v. Italie*, App no. 55772/08 (ECHR, 26 July 2011) and also the case law discussed in Panzavolta, M., Flor, R. (2015): 145.

on the other hand, the adversarial nature and equality of arms should be appropriately addressed in this type of unique procedure to guarantee these rights, while simultaneously not undermining the objective of the procedure – to swiftly remove illicit property from the market. This is the core challenge when structuring these non-criminal procedures – balancing guarantees with ensuring the achievement of their objectives, which concern the deprivation of goods related to criminal activity without the need for a criminal trial. In this context, the ECHR has stated in some cases that the right to access relevant information is not absolute, and qualified public interest may justify such a restriction, for example the need to keep certain police investigation/surveillance methods secret.[99] There may be reasonable grounds to also limit access to some information in NCBC proceedings, especially if there is a parallel criminal trial against the criminal accomplice of the property owner, or in cases where law enforcement sequentially targets the property of several people who worked in an organized group – where the first owner of the tainted property may warn the others about the methods utilized by the authorities before their property can be identified and tracked.

Even in the wake of such justification, a restriction concerning access to information cannot influence the very essence of the right to a fair trial[100] since the owner of the property must, as a party to a judicial proceeding, be able to submit any observations relevant to the case,[101] especially those concerning the legal pedigree of the contested property. Thus, first, the owner of the targeted property should know the legal basis of actions taken against the property, and its reasons, and second, they should be able to put forward explanations and evidence. These claims may be positive: showing the legal origin of the property, or negative: undermining the reasons and suspicions put forward by the authorities in NCBC proceedings. Not only must the procedure be shaped in this manner, but at the same time, the national legislator must place the duty on a court to conduct a proper examination of the owner's submissions without prejudice to its assessment of whether they are relevant,[102] and clearly state the reasoning on which their final decisions are based.[103] The importance of this aspect can be seen in *Rummi,* where the ECHR stated that the reasoning presented in the final judgment ordering the confiscation of property was brief, especially in commenting on evidence provided by the State against the applicant, the domestic court did not make any attempt to assess the suspicions raised within the trial against these documents and thus Article 6 § 1 of the Convention was violated.[104]

In this context, it is necessary to ensure equality of arms within proceedings, which means that each party must be allowed to present their case under

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[99] *Adomaitis v. Lithuania*, App. no. 14833/18 (ECHR, 18 January 2022): § 68.

[100] *Regner v. the Czech Republic*, App. no. 35289/11 (19 September 2017): § 148; *Adomaitis v. Lithuania*: § 68–74.

[101] *Xhoxhaj v. Albania*: § 326.

[102] *Perez v. France,* App. no. 47287/99 (ECHR, 12 February 2004): § 80.

[103] *Ruiz Torija v. Spain*, App. no. 18390/91 (ECHR, 9 December 1994): § 29–30.

[104] *Rummi v. Estonia*: § 85.

conditions that do not place them at a disadvantage *vis-à-vis* the other party.[105] As mentioned before, this principle is inherently connected with the principle of adversarial proceedings,[106] which can be seen in cases where the Court has found a breach of this principle, for instance when the defendant could not challenge expert evidence submitted by the public authorities.[107] These are the core principles in the context of NCBCs, since the owner of the contested property usually bears the burden of proof and, thus, may find themselves in an unfavourable position against the public apparatus. That imbalance, in the wake of significant shortcomings in adversity of procedure and equality of arms, would be a source of concerns from the perspective of compliance with Article 6 § 1 of the Convention.

2.3. Shifting the *onus probandi*

The final element of the right to fair trial assessed in the context of the discussed confiscation is the reversed burden of proof. The Court examines this aspect under stricter scrutiny than in the case of requirements based on Article 1 of Protocol no. 1 and states that it is permissible only in exceptional circumstances. In the case of *Silickienė v. Lithuania,* it stated that shifting the burden of proof must be connected to an opaque method of hiding illicit gains, and should be justified by pursuit of a criminal organization, especially given the scale, systematic nature and organizational level of the illegal activity.[108] The same reasoning was reiterated in the context of fighting corruption among public officials, where the ECHR underlined the importance of 'prevention and eradication of corruption in the public service'.[109] This implies that an NCBC may concern only property derived from illicit activity of certain wrongfulness and scope, and not in cases of illegal activity that does not pose a serious threat to public order at a significant scale. Shifting the burden of proof has to be, however, seen in conjunction with both the adversarial nature of the proceeding and general procedural guarantees resulting from Article 1 of Protocol no. 1, since it must take place only after the public authorities have submitted a substantiated claim that justifies the initiation of judicial proceedings against a particular property (which usually happens after the freezing of particular assets in order to prevent the owner from hiding them) with the possibility for the owner to counter those claims,[110] and the safeguards of access to court and public hearing.[111]

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[105] *Regner v. the Czech Republic*: § 146.

[106] Ibid.

[107] *Duško Ivanovski v. the Former Yugoslav Republic of Macedonia*, App. no. 10718/05 (ECHR, 24 April 2014): § 60.

[108] *Silickienė v. Lithuania*: § 67–69.

[109] *Telbis and Viziteu v. Romania*, App. no. 47911/15 (ECHR, 26 June 2018): § 7780; *Todorov v. Bulgaria*: § 193.

[110] *Phillips v. the United Kingdom*, App. no. 41087/98 (ECHR, 5 July 2001): § 45; *Grayson and Barnham*, App. nos. 19955/05 and 15085/06 (ECHR, 23 September 2008): § 37–49; *Gogitidze and Others v. Georgia*: § 122.

[111] *Grayson and Barnham*: § 45; *Phillips v. the United Kingdom*: § 43.

V. CONCLUSIONS

Given the increasing presence of NCBC regimes in the Member States of the EU,[112] it is apparent that the legal framework of such regimes will draw more attention and become more detailed. Currently, since EU law does not apply to non-criminal confiscation proceedings (unless there is a specific link with EU law), the case law of the ECHR is the main point of reference for domestic legislators. Even though the ECHR has usually declared that States are granted a wide margin of appreciation in choosing the policy instruments that are aimed at fighting crime and recovering the potential proceeds of crime, the above analysis shows that case law more than 30 years old provides limits and safeguards from the perspective of Article 1 of Protocol no. 1 to the Convention and Article 6 § 1 of the Convention. The core issues defining acceptable NCBC regimes seem to be sufficient links between illegal activity and the targeted property to justify initiation of NCBC proceedings, an adequate scope of offences that may entail proceedings against assets derived from illegal activity, clear and foreseeable preconditions for initiating such proceedings, the precise temporal scope of application of confiscation, protection for *bona fide* property owners, and procedural guarantees in regards to the adversarial nature of trial and equality of arms. Nevertheless, while this framework still needs to be developed, the existing case law of the ECHR seems to be robust enough. In effect, the discretion of domestic legislators appears to not be quite as extensive as it may appear at first glance.

The discussed ECHR case law offers a blueprint for shaping NCBC procedures for both groups of legislators – domestic as well as European ones, since the European Convention of Human Rights provides boundaries not only for the Member States but also for the EU itself, as the rights contained in the EU's Charter correspond to those guaranteed by the Convention,[113] which is also an essential benchmark for the general principles of EU law.[114] Thus, the case law analysed in this paper may soon play a vital role within the EU legal order, since as mentioned before, the Commission is eager to include it in a new, revised directive on confiscation.

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[112] Colin King (2022: 113) indicates that, as of 2022, at least 13 Member States have some form of *in rem*/unexplained wealth procedures or have draft law envisaging such regimes.

[113] See Article 52 (3) of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391) which states that as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by said Convention. For deeper analysis of this rule and the presumption of equivalent protection, see Gragl (2017) and Kokott, Sobotta (2015).

[114] This is so due to Article 6(3) Treaty on European Union (OJ C 326, 26.10.2012, p. 13), which indicates that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, shall constitute general principles of the Union's law.

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